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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 637.

CAROLINA SCENIC COACH LINES, a Co-partnership,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF IN BEHALF OF APPELLANT OPPOSING MOTION BY APPELLEES TO AFFIRM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA (ASHEVILLE DIVISION) AND OPPOSING MOTION BY SMOKY MOUNTAIN STAGES, INC., INTERVENER-APPELLEE, TO AFFIRM THE SAID DECREE OR DISMISS THE APPEAL.

CAROLINA SCENIC COACH LINES,
Appellant.

By WILMER A. HILL,
Its Attorney.

Of Counsel:
MONROE M. REDDEN,
Hendersonville, N. C.

AMES, HILL & AMES,
Transportation Building,
Washington 6, D. C.

Dated at
238-241 Transportation Building,
Washington 6, D. C.,
November 17, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Pursuant to paragraph 3 of Rule 7 of the Revised Rules of the Supreme Court of the United States, comes now appellant, Carolina Scenic Coach Lines, and files this its brief opposing the motion of appellees to affirm the decree of the specially constituted District Court of three Judges[1] and also opposing the motion of Smoky Mountain Stages,

[1] The said motion of the appellees was filed in the District Court of the United States for the Western District of North Carolina (Asheville Division) in Civil Action No. 507 and was served on appellant on October 31, 1944.

Inc., intervener-appellee, hereinafter called Stages, that the said decree[2] be affirmed or the appeal dismissed.

I.

The facts in respect to the merits of the cause and of the appeal are adequately set forth in the appeal itself, and, therefore, the instant opposing brief does not deal with that subject. This Brief stems, instead, from two mistaken assertions by Stages[3] which bear directly on jurisdictional features of the proceeding, namely,

(a) that the "presentation of the order allowing the appeal to the District Court was held in a state of suspense at the request of counsel for appellant pending final determination by its counsel as to whether they would perfect the appeal" (page 2 of motion by Stages); and

(b) that "Washington counsel for appellant (sic) have not to date been served with a copy of the petition for an order allowing the appeal," etc., and that "Appellee (sic) has accordingly violated paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States," etc. (page 3 of motion by Stages).

II.

We turn first to the statement by Stages that the presentation of the order allowing the appeal was held in a state of suspense at the request of counsel for appellant. In this, Stages is in error. The appeal papers were properly filed in the said District Court on September 1, 1944, and at no

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[2] The said motion of Stages was filed in the District Court of the United States for the Western District of North Carolina (Asheville Division) in Civil Action No. 507 and was served on appellant on October 30, 1944.

[3] The motion by appellees, at page 2 thereof, refers only casually to the first of the two assertions by Stages to which this brief in opposition is directed; our discussion hereinafter will deal solely with the motion by Stages.

time was there a request by counsel for appellant that action on the appeal be deferred. Subsequently to the filing of the appeal in the said District Court, the Clerk of that Court expressed some doubt concerning the appropriate method for handling on his part, and there followed conversations and written communications between the Clerk and one of counsel for appellants, but we repeat that neither of said counsel sought any suspension of action. On and after September 1, 1944, the said appeal was uninterruptedly on file in the said District Court and was at all times awaiting allowance. In explanation of Stages' misunderstanding, it should perhaps be added that at one time (on or about September 19, 1944) informal inquiry was made of the Clerk whether transmission of the appeal papers to the United States Supreme Court could await the outcome of appellant's petition (then pending before the Interstate Commerce Commission) for a further hearing before that Commission based on newly discovered evidence, by the granting of which petition the Court proceedings would have become moot, but it should also be reiterated that there was no request by counsel for suspension of action by the Clerk or by the District Court.

III.

At pages 2 and 3 of the motion by Stages appears the following:

> "In its October term, 1942, the Supreme Court amended its rules as follows:
>
> 'An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the Judge or Justice who allows it. A prior timely application to another Judge or Justice does not extend the statutory period. See Matton Steamboat Company v. Murphy, 319 U. S. 412'.
>
> It seems clear the appellants have failed to comply with the provisions of the statute requiring the perfection of an appeal within sixty days from the date of

the entry of the final order or decree. The appeal should be dismissed."

The case cited is patently not here in point. In *Matton Steamboat Company* v. *Murphy,* 319 U. S. 412, the applicable statute provided that "no appeal • • • intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree." Appellant there made timely application for allowance of its appeal to the Chief Judge of the New York Court of Appeals, "who, being in doubt as to the finality of the judgments, denied the applications shortly before the expiration of the three months period." Appellant took no further action to perfect its appeal *within the three months period,* and the United States Supreme Court concluded that "appellants' applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed."

In the instant case the Court will observe, as stated in paragraph II herein above, that the appeal was timely and was pending at all times during the sixty-day period provided by statute; and it accordingly seems necessary to do no more than direct the attention of the Court to its observation in *Matton Steamboat Company* v. *Murphy, supra,* that "appellants' applications to the Chief Judge of the Court of Appeals were timely, and could have been allowed by him either before or after the expiration of the three months period." The appeal here was in fact allowed some six days after the expiration of the sixty-day period.

IV.

This brings us to the assertion by Stages that its *Washington* counsel were not served with a copy of the assignments of error, etc. The fact is, however, as the records

of the District Court will readily disclose, that the service in question was made on R. Gregg Cherry, Esquire, with offices in Gastonia, N. C., who was one of counsel of record for Stages. Thus there was a full compliance with paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States. Stages is here obviously in error.

V.

WHEREFORE, appellant prays that the respective motions of the appellees and of Stages be disallowed and that the said decree of the District Court be reversed.

Respectfully submitted,

CAROLINA SCENIC COACH LINES,
Appellant.
By WILMER A. HILL,
Its Attorney.

Of Counsel:

MONROE M. REDDEN,
Hendersonville, N. C.

AMES, HILL & AMES,
Transportation Building,
Washington 6, D. C.

Dated at
238-241 Transportation Building,
Washington 6, D. C.,
November 17, 1944.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day made service of the foregoing document upon each of the following named counsel for appellees and for Smoky Mountain Stages, Inc., intervener-appellee, by mailing to each of said counsel a copy thereof by first-class mail:

Charles Fahy, Esquire,
Solicitor General,
Department of Justice,
Washington, D. C.

Daniel W. Knowlton, Esquire.
Chief Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

William A. Roberts, Esquire,
Roberts & McInnis,
Transportation Building,
Washington 6, D. C.

and that a copy thereof has likewise been transmitted by first-class mail to the Clerk of the District Court of the United States for the Western District of North Carolina (Asheville Division) at Asheville, N. C.

Dated at Washington 6, D. C., this 17th day of November, 1944.

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WILMER A. HILL,
Attorney for Appellant.